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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 WALTER TURNER, *et al.*,

11 Plaintiffs,

12 v.

13 BANK OF AMERICA, N.A., *et al.*,

14 Defendants.  
15  
16

Case No. 2:12-cv-1319-LDG (CWH)

**ORDER**

17 In their complaint, Walter and Dondi Turner allege that Bank of America foreclosed  
18 upon their home in June 2011. The Turners further allege they had refinanced the home in  
19 April 2005, through, and as result of improper conduct by, Argent Mortgage Company. The  
20 Turners' complaint alleges causes of action against Argent, Bank of America, and other  
21 entities involved with the foreclosure. Argent moves to dismiss (#18), arguing, *inter alia*,  
22 that the first five counts are barred by the statute of limitations, and the last cause of action  
23 for wrongful foreclosure does not allege any conduct by Argent. Bank of America,  
24 ReconTrust Company, and Wells Fargo Bank join in the motion (#20), arguing that all  
25 claims are barred by the limitation periods and that the first five counts do not allege  
26 conduct attributable to them. The Turners have opposed (#19).

1 Motion to Dismiss

2       The defendants' motions to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),  
3 challenge whether the plaintiffs' complaint states "a claim upon which relief can be  
4 granted." In ruling upon this motion, the court is governed by the relaxed requirement of  
5 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim  
6 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a  
7 plaintiff must allege sufficient factual matter, accepted as true, "to state a claim to relief that  
8 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
9 Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's  
10 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels  
11 and conclusions, and a formulaic recitation of the elements of a cause of action will not do."  
12 *Id.*, at 555 (citations omitted). In deciding whether the factual allegations state a claim, the  
13 court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . .  
14 dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v.*  
15 *Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the  
16 light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of*  
17 *Beaumont*, 506 F.3d 895, 900 (9<sup>th</sup> Cir. 2007).

18       However, bare, conclusory allegations, including legal allegations couched as  
19 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. "[T]he tenet  
20 that a court must accept as true all of the allegations contained in a complaint is  
21 inapplicable to legal conclusions." *Ashcroft v. Iqbal* 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949  
22 (2009). "While legal conclusions can provide the framework of a complaint, they must be  
23 supported by factual allegations." *Id.*, at 1950. Thus, this court considers the conclusory  
24 statements in a complaint pursuant to their factual context.

25       To be plausible on its face, a claim must be more than merely possible or  
26 conceivable. "[W]here the well-pleaded facts do not permit the court to infer more than the

1 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the  
2 pleader is entitled to relief.’ *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual  
3 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.  
4 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely  
5 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

#### 6 Factual Background

7       As the present matter comes before the Court on defendants’ motions to dismiss,  
8 the Court accepts the allegations of the complaint as true for purposes of deciding the  
9 motions. On or about April 19, 2005, the Turners refinanced their home through Argent.  
10 The Turners allege that, in connection with the refinancing, Argent engaged in bait and  
11 switch practices. Argent, they allege, induced them to sign loan documents with terms less  
12 favorable than represented, or unfavorable terms that were not requested or disclosed.  
13 Without their knowledge, Argent falsified income, employment, assets and deposits in  
14 order to qualify the Turners for a loan larger than they could afford, resulting in monthly  
15 payments exceeding the Turners’ monthly income or which Argent knew or should have  
16 known the Turners could not support. Argent conducted the refinancing so as to preclude,  
17 or mislead, the Turners from reading the documents they were signing. Argent also failed  
18 to provide required disclosures and loan documents, or by failing to provide true copies of  
19 those documents. As a result, Argent withheld from the Turners the actual terms of the  
20 loan. The Turners allege that they did not receive complete copies of the loan documents  
21 until after contacting counsel in 2012.

22       On or about June 29, 2011, Bank of America, through ReconTrust Company,  
23 foreclosed upon the home, which Wells Fargo purchased at the foreclosure sale. The  
24 Turners allege the foreclosure was conducted without following the requirements of state  
25 and federal law.

1 Analysis

2 In their first five claims for relief, the Turners allege conduct only by Argent.  
3 Accordingly, these claims are properly dismissed as to Bank of America, ReconTrust, and  
4 Wells Fargo. In their sixth claim for relief, the Turners acknowledge they have not alleged  
5 conduct by Argent and concede the claim should be dismissed as to Argent.

6 As to the first five claims, alleged against Argent, the Turners assert a violation of  
7 the Truth in Lending Act (TILA), 15 U.S.C. §1601 *et seq.* and Federal Reserve Regulation  
8 Z, 12 C.F.R. §226.1 *et seq.* (Count 1), fraud in the inducement (Count 2), servicing the loan  
9 without mandatory TILA disclosures (Count 3), selling and originating the loan in violation  
10 of TILA (Count 4), and a violation of the Nevada Unfair Lending Practices Act (NULPA)  
11 (Count 5). Argent argues that each of these claims is barred by the relevant statute of  
12 limitations. As acknowledged by the Turners, the applicable statute of limitations for  
13 damages resulting from a TILA violation is one year.<sup>1</sup> See 15 U.S.C. 1640(e) (“Any action  
14 under this section must be brought in any United States district court, or in any other court  
15 of competent jurisdiction, within one year from the date of the occurrence of the violation.”).  
16 The Turners concede that they filed their complaint more than one year after their TILA  
17 claims accrued. As also acknowledged by the Turners, the applicable statute of limitations  
18 for their NULPA claim is two years. See, NRS §§ 598D.100, 598D.110, 11.190(4)(b).  
19 Again, the Turners acknowledge their complaint, which they filed in 2012, was filed more  
20 than two years after the alleged conduct underlying this claim, which occurred in April  
21 2005. As to each of these four claims, the Turners argue that they are entitled to an  
22 equitable tolling of the applicable statute of limitations because they did not discover or  
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25 <sup>1</sup> In their opposition, the Turners concede that their TILA claims do not seek  
26 the remedy of rescission, as the applicable statute of limitations of three years for a TILA  
claim for rescission has expired.

1 become aware of the alleged violations until they retained counsel, which they allege  
2 occurred early in 2012.

3 As to the Turners' second cause of action, for fraud in the inducement, both parties  
4 agree that the applicable statute of limitations period is three years. See NRS  
5 §11.190(3)(d). The Turners note that this limitations period commences "upon discovery  
6 by the aggrieved party of the facts constituting the fraud or mistake." *Id.* Relying upon their  
7 equitable tolling argument, the Turners assert that their claim for fraud did not accrue until  
8 the Turners consulted with an attorney about their rights.

9 The Turners' equitable tolling and accrual of claim arguments are without merit.  
10 Both arguments ignore their discovery of the facts constituting their claims, and instead rely  
11 upon their being informed by an attorney that those facts constituted causes of actions.  
12 Equitable tolling, while potentially available, is appropriately applied only when "despite all  
13 due diligence, a plaintiff is unable to obtain vital information bearing on the existence of the  
14 claim." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9<sup>th</sup> Cir. 2000). The standard  
15 suggested by the Turners, which seeks to toll the statute of limitations for all  
16 unsophisticated borrowers until they seek the advice of counsel, would both eviscerate the  
17 statute of limitations and deter rather than promote the requisite due diligence. Similarly,  
18 while the Turners correctly quote the statutory requirement that a claim for fraud does not  
19 accrue until the discovery of the facts constituting the fraud, they do not offer any  
20 arguments regarding their discovery of the facts underlying their claim for fraud. Absent  
21 from either the complaint or the Turners' opposition is any suggestion that, despite their  
22 exercise of due diligence, they were unable to discover the facts constituting their claim of  
23 fraud. That the Turners became aware, during a visit to a lawyer, that they could bring a  
24 claim for fraud is irrelevant to the critical issue as to when they discovered the facts  
25 supporting that claim for fraud. Accordingly, the Court will dismiss with prejudice the first  
26 five claims, brought against Argent, as each is barred by a relevant statute of limitations.

1 The Turners' final claim is brought against Bank of America, ReconTrust, and Wells  
2 Fargo for wrongful foreclosure. Pursuant to NRS 107.080(5), an action to rescind a  
3 trustee's sale must be brought within ninety days of the sale. The Turners allege that the  
4 sale was conducted on June 23, 2011. They did not bring this action until May 2012, far  
5 beyond the ninety-day period for commencement of an action to rescind the sale. Further,  
6 the Turners' complaint fails to allege that they were not in default on the loan. Rather, the  
7 implication of their claims against Argent indicates that they did default on their loan.  
8 Conversely, the Turners have not alleged that they have tendered the entire amount due  
9 and owing on the loan, a necessary prerequisite to maintaining an action for wrongful  
10 foreclosure. Accordingly, the Court will dismiss with prejudice the Turners' claim for  
11 wrongful foreclosure as against Bank of America, ReconTrust, and Wells Fargo.

12 Therefore, for good cause shown,

13 THE COURT **ORDERS** that Joinder of Argent Mortgage Company's Motion to  
14 Dismiss (#19) of Defendants Bank of America, N.A., ReconTrust Company, N.A., and  
15 Wells Fargo Bank, N.A., as Trustee for the Certificateholders of Park Place Securities, Inc.,  
16 Asset-Backed Pass-Through Certificates, Series 2005-WCW3 is GRANTED;

17 THE COURT FURTHER **ORDERS** that Defendant Argent Mortgage Company's  
18 Motion to Dismiss (#18) is GRANTED;

19 THE COURT FURTHER **ORDERS** that the First Amended Complaint (#15) is  
20 DISMISSED with prejudice.

21  
22 DATED this 25 day of January, 2013.

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25 Lloyd D. George  
26 United States District Judge